

1 rated, you can't give Nielsen-type numbers to  
2 illustrate, validate how popular you are among  
3 viewers who can view you.

4 This Rentrak system was designed  
5 to -- with respect to certain types of  
6 programming, enable a channel like WealthTV to  
7 understand how many people were -- how popular  
8 their programming was. And so the content of  
9 this e-mail is an exchange about -- am I  
10 reading this right? Are we ranked the way  
11 that I think we are ranked based on the report  
12 that we have from you?

13 MR. COHEN: Your Honor, our  
14 problem, in addition to the hearsay, is -- it  
15 is not a market report. It is a report for a  
16 single client for which one pays that it does  
17 not fit within the hearsay exception. And I  
18 would be happy to be corrected, but there is  
19 nobody on this side of the table who can  
20 remember a Rentrak report being produced by  
21 Wealth, or it being attached to any complaint  
22 that was filed against any of the defendants.

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1 MS. WALLMAN: I will try to verify  
2 this while we are here right now.

3 MR. COHEN: But I wouldn't -- and  
4 it wouldn't cure my hearsay objection with  
5 respect to Ms. Rennart's -- Hinnart's part of  
6 the e-mail in any case.

7 MS. WALLMAN: No. It would only  
8 go to the prejudice point you made.

9 MR. COHEN: Yes.

10 JUDGE SIPPEL: Well, if you want  
11 to clear that up, that is fine. But I don't  
12 see why I should hold up on ruling here. I am  
13 going to sustain the objection. I don't know  
14 what this adds. I really don't.

15 And without a witness -- a  
16 business witness from -- what is it called?  
17 Rentrak here to authenticate what -- well,  
18 authenticate and also to explain the  
19 reliability and the usefulness of this  
20 evidence, I just wouldn't receive it. It is  
21 too -- it is speculative at best, and it is  
22 admittedly confusing.

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1                   So I am rejecting it as an  
2 exhibit. It is marked as WTV Exhibit 38, but  
3 it is rejected as an exhibit.

4                   (Whereupon, the above-referred to  
5 document was marked as WTV Exhibit  
6 No. 38 for identification, but was  
7 rejected as an exhibit.)

8                   Next exhibit, please.

9                   MR. ROSE: 39 is an e-mail from --  
10 I believe they are both internal to WealthTV.  
11 It is a record about a meeting. It is an e-  
12 mail about when a meeting was happening. My  
13 understanding is Mr. Herring was at the  
14 meeting, and this is just a record to show  
15 when it happened, I believe.

16                   MR. COHEN: I just don't know what  
17 the relevance of this is, Your Honor, in terms  
18 of cluttering the record. This is a meeting  
19 with I guess Charter. So I don't know what  
20 the dispute is, if any. It is not an internal  
21 e-mail. Brooke Sinclair is external. Mr.  
22 Ghiorzi is not here, so we can't ask him what

1 the meeting was about.

2 So, I mean, Mr. Herring can  
3 testify about a meeting he was at, but I don't  
4 understand that there is any dispute in this  
5 case with respect to a meeting with Charter in  
6 March of 2007. So I guess we are befuddled,  
7 and so -- and we do have a hearsay objection.

8 JUDGE SIPPEL: Okay. What do you  
9 intend to prove with this document?

10 MR. ROSE: I believe it is just to  
11 show that -- you know, refresh his  
12 recollection as to when the meeting occurred,  
13 and then Mr. Herring will be discussing the  
14 meeting itself.

15 JUDGE SIPPEL: Well, one of the  
16 pre-conditions for refreshing recollection is  
17 the witness says, "I don't remember." And  
18 that is not here, so I am going to reject it.

19 Now, if it turns up that you need  
20 it later for that purpose, or for a similar  
21 purpose, that is allowable. You can go back  
22 to it. But I am going to simplify the record.

1 I am going to reject it now as an exhibit.

2 (Whereupon, the above-referred to  
3 document was marked as WTV Exhibit  
4 No. 39 for identification, but was  
5 rejected as an exhibit.)

6 Okay. Next is 40.

7 MR. ROSE: There appears to be no  
8 objection to 40. It is another ad from  
9 WealthTV.

10 JUDGE SIPPEL: Okay. Do we have a  
11 series of non-objecteds or --

12 MR. COHEN: No, we are --

13 PARTICIPANT: It is a series of  
14 one.

15 JUDGE SIPPEL: A series of one.  
16 All right.

17 (Laughter.)

18 Whether it is one or 50, it is a  
19 series. Okay.

20 Exhibit 40 is another ad. Is that  
21 right?

22 MR. ROSE: Yes, sir.

1 JUDGE SIPPEL: I am just trying to  
2 get my tabs straight here. Okay. And that is  
3 clearly an ad, and it is identified and  
4 received in evidence -- that is, it is an ad  
5 of WealthTV programming. Is that accurate?

6 MR. ROSE: It is something  
7 WealthTV put out describing its brand and its  
8 services, and so forth.

9 JUDGE SIPPEL: Close enough. It  
10 is not objected to, in any event, and it is  
11 identified and it is now received in evidence  
12 --

13 MR. COHEN: Your Honor, just so --  
14 I'm sorry.

15 JUDGE SIPPEL: Go ahead.

16 MR. COHEN: Just so the record is  
17 clear, I think it is an ad that Charter put  
18 out that had WealthTV on it. So if we are  
19 going to characterize it as something, I don't  
20 think it is a WealthTV ad. I think it is a  
21 Charter ad.

22 MR. ROSE: I stand corrected.

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1 JUDGE SIPPEL: It is a Charter ad.

2 MR. COHEN: We still don't object.

3 JUDGE SIPPEL: It is a Charter ad  
4 concerning WealthTV programming or Charter  
5 programming?

6 MR. ROSE: Well, it is a --  
7 WealthTV paid Charter to publish it is what  
8 happened. It is Wealth's ad.

9 JUDGE SIPPEL: Okay. Fair enough.  
10 Identified -- and there is still no objection.

11 MR. COHEN: Correct.

12 JUDGE SIPPEL: So it is identified  
13 and received as WTV Exhibit 40.

14 (Whereupon, the above-referred to  
15 document was marked as WTV Exhibit  
16 No. 40 for identification, and was  
17 received in evidence.)

18 Okay. Let's see -- okay.

19 MS. WALLMAN: Your Honor, if I may  
20 interrupt the flow briefly, I just want to --

21 JUDGE SIPPEL: Yes, ma'am.

22 MS. WALLMAN: -- go back, a point

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1 of clarification with respect to that Rentrak  
2 report. It was an exhibit to our reply to the  
3 answer of Bright House Network. It is Exhibit  
4 1.

5 JUDGE SIPPEL: Exhibit Number 1 to  
6 the Bright House reply?

7 MS. WALLMAN: Yes.

8 MR. MILLS: Was it -- the e-mail  
9 was or the Rentrak underlying report?

10 MS. WALLMAN: The underlying  
11 Rentrak report dated January 14, 2008.

12 JUDGE SIPPEL: All right. WTV  
13 Exhibit 41.

14 MR. COHEN: Your Honor, we have  
15 the same objection as we did 39. And I have  
16 to say, I don't know how we could have  
17 documents to refresh recollection with written  
18 testimony. So, you know, I am not sure I  
19 understood the rationale for 39.

20 JUDGE SIPPEL: Mr. Rose? Same  
21 type document?

22 MR. ROSE: It is.



1 JUDGE SIPPEL: All right. Same  
2 ruling. If you have a reason to bring it back  
3 in, you can try it again. But I don't see it  
4 -- just on its face it is all the things that  
5 Mr. Cohen objects to. So it is identified,  
6 but it is rejected as -- this is Exhibit 41.  
7 It is rejected as an exhibit.

8 (Whereupon, the above-referred to  
9 document was marked as WTV Exhibit  
10 No. 41 for identification, but was  
11 rejected as an exhibit.)

12 Next one.

13 MR. COHEN: Same objection, Your  
14 Honor, for 42.

15 JUDGE SIPPEL: What about 42, Mr.  
16 Rose?

17 MR. ROSE: The same sort of thing.

18 JUDGE SIPPEL: Same situation?

19 MR. ROSE: It describes a meeting.  
20 He was there.

21 JUDGE SIPPEL: Okay. Same ruling.  
22 Identified and rejected.

1 (Whereupon, the above-referred to  
2 document was marked as WTV Exhibit  
3 No. 42 for identification, but was  
4 rejected as an exhibit.)

5 MR. ROSE: 43 is somewhat  
6 different. These are notes that were taken by  
7 a WealthTV employee. They were placed in  
8 Wealth's records. This is his account.

9 Wealth had their employees, you  
10 know, memorialize their meetings, their sales  
11 people, and so forth. This isn't a call  
12 report. The call reports are regularly done.  
13 But this particular employee kept his  
14 information in a database that -- at the  
15 request of his employer, and this is a record  
16 he had in there.

17 MR. SOLOMON: We object, Your  
18 Honor. Are you on 43?

19 MR. ROSE: I believe I am.

20 JUDGE SIPPEL: Yes.

21 MR. SOLOMON: So we object to 43.  
22 43, if you look at it, is a draft e-mail that

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1 is unsigned, addressed to someone named Judy.  
2 We understand that it may be addressed to  
3 somebody at Adelphia from someone from  
4 WealthTV who is not being called as a witness.

5 So, first of all, it is not clear  
6 what it is and how it can be authenticated,  
7 but it is certainly hearsay. Mr. Herring  
8 can't be cross examined about a draft e-mail  
9 that one of his employees who is not  
10 testifying sent to another company.

11 JUDGE SIPPEL: Well, Mr. Rose, do  
12 you want to respond to that, or --

13 MR. ROSE: All I can say in its  
14 defense is he found it in the business  
15 records, and he wasn't at this meeting, so it  
16 is in fact a record of what somebody else  
17 reported about the meeting.

18 JUDGE SIPPEL: Well, that is  
19 hearsay, and it is -- the reliability is not  
20 established, so I am going to reject it. It  
21 is identified and rejected, but it goes with  
22 the record. Number 43.

1 (Whereupon, the above-referred to  
2 document was marked as WTV Exhibit  
3 No. 43 for identification, but was  
4 rejected as an exhibit.)

5 MR. ROSE: 44 I believe is  
6 intentionally blank, so there is not much to  
7 talk about there.

8 PARTICIPANT: 44 is --

9 PARTICIPANT: There isn't an  
10 Exhibit 44.

11 PARTICIPANT: I don't have it.

12 MR. SOLOMON: We have it. We  
13 don't object to it.

14 JUDGE SIPPEL: Oh. This is  
15 another Judy e-mail?

16 MR. ROSE: Apparently, there is no  
17 objection to it. I just don't have a copy in  
18 my folder.

19 JUDGE SIPPEL: There is no  
20 objection?

21 MR. COHEN: Well, let's be clear.  
22 If 44 is what we think it is. Let's not say

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1       there is no objection until we find out what  
2       they think 44 is.

3               MR. SOLOMON: 1622. I don't have  
4       the document, but it says it is document  
5       number --

6               MR. COHEN: Do you want me to show  
7       it to you? Your Honor, may I?

8               JUDGE SIPPEL: Go ahead. Yes,  
9       sure. Go right ahead. I have got my copy.

10              MS. WALLMAN: Thank you.

11              MR. FELD: It was mispaginated,  
12       Your Honor. I am sorry. It is actually --  
13       some notebooks have this as the first page  
14       behind Tab 45. It should actually have been  
15       a separate tab, the e-mail from John Ghiorzi  
16       to Charles Herring.

17              JUDGE SIPPEL: Okay.

18              MR. FELD: Is that the same as  
19       the --

20              MR. SOLOMON: Your Honor, I would  
21       like to clarify what it is being admitted for.

22              JUDGE SIPPEL: I am, too. But it

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1 is dated March 31, 2008. Now, who is Mr.  
2 Ghiorzi?

3 MR. SOLOMON: Mr. Ghiorzi is a  
4 witness from Wealth who is not testifying.  
5 So, I mean, if Mr. Herring just wants to  
6 testify that he received it, I suppose he can.  
7 But with respect to what Mr. Ghiorzi is  
8 saying, he is not -- he is not testifying, so  
9 that is hearsay.

10 JUDGE SIPPEL: Well, he is an  
11 employee. Well, can somebody explain? Is he  
12 an employee of Wealth?

13 MR. ROSE: He is an employee of  
14 Wealth, and he is reporting on his activities,  
15 basically trying to set up sales meetings and  
16 things. But this one happens to be an e-mail.  
17 It is not within the format of the call  
18 reports that they kept on a routine basis, but  
19 it is a similar sort of report about what he  
20 was doing in his sales efforts.

21 JUDGE SIPPEL: And it is to -- I  
22 haven't seen it, so I am just speaking. But

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1 it is Mr. Charles Herring, and it starts off,  
2 "Judy sent e-mail asking I call her." And  
3 there is no objection to this?

4 MR. SOLOMON: No. We do object to  
5 the extent it is being introduced for its  
6 truth. Judy must have heard from Comcast. It  
7 is completely speculative hearsay, to the  
8 extent they are just introducing it to say  
9 that Mr. Herring received this e-mail and had  
10 no idea whether it is true or not. We have no  
11 objection if there is importance to the fact  
12 that he received it as opposed to the contents  
13 of what it says.

14 MR. FELD: It is the basis for Mr.  
15 Herring's belief about an incident to which he  
16 will testify that he received a report from an  
17 employee under his supervision with regard to  
18 these activities. So, yes, that is the  
19 purpose for which it was introduced. It is to  
20 show Mr. Herring's knowledge -- where Mr.  
21 Herring's knowledge of this comes from.

22 JUDGE SIPPEL: Okay. Well, then,

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1 based on the objection, Mr. Solomon's  
2 objection, I am going to have to reserve on  
3 this until it is shown to the witness, Mr.  
4 Herring, and he identifies what it is, and  
5 then is there a need for it. But anyway,  
6 let's -- we have to -- I am reserving on 44,  
7 but it is identified.

8 (Whereupon, the above-referred to  
9 document was marked as WTV Exhibit  
10 No. 44 for identification, but  
11 ruling on its admission was  
12 reserved.)

13 Next one is 45?

14 MR. ROSE: This is a report that  
15 Mr. Ghiorzi made in 2008 at Mr. Herring's  
16 request. Mr. Herring is going to testify  
17 about what happened at this meeting. Herring  
18 was there. And this is Ghiorzi's summary of  
19 what he remembered from the meeting as he  
20 reported it to Mr. Herring, three years after  
21 the fact, obviously.

22 MR. SOLOMON: Your Honor, I

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1 believe that is not the case. This is an e-  
2 mail from Mr. Ghiorzi to himself. I don't see  
3 on the copy that we have any showing that this  
4 was to Mr. -- to Mr. Ghiorzi. There is no  
5 showing that it was sent to Mr. Herring, and  
6 it is significant here that Mr. Ghiorzi was a  
7 declarant in the complaint.

8           Wealth had earlier indicated that  
9 it intended to call Mr. Ghiorzi. It is now  
10 not calling him, so Mr. Ghiorzi is not  
11 available for cross examination. So to the  
12 extent that they want to rely on what Mr.  
13 Ghiorzi remembered two or three years after a  
14 meeting, they should present Mr. Ghiorzi and  
15 have him cross examined. They chose not to,  
16 so this should be rejected as hearsay.

17           JUDGE SIPPEL: All right. Let me  
18 start by asking Mr. Rose: who is Mr. Ghiorzi?  
19 I know he is an employee. What is his job?  
20 What is Mr. Ghiorzi's job?

21           MR. ROSE: He is a sales person.  
22 He sells -- he tries to sell to, you know,

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1 affiliates, trustee of the programming placed  
2 on the operator.

3 JUDGE SIPPEL: So that is -- he is  
4 a sales person. Is he -- does he rank in the  
5 organization?

6 MS. WALLMAN: He was in charge of  
7 affiliate sales, and he is a former employee  
8 of WealthTV.

9 MR. ROSE: He was called --  
10 Executive Vice President was his title.

11 JUDGE SIPPEL: Executive VP, and  
12 he was in charge of -- I'm sorry, you said --

13 MS. WALLMAN: It is called  
14 affiliate sales.

15 JUDGE SIPPEL: Affiliate sales.

16 MS. WALLMAN: The process by which  
17 a channel tries to sell its programming to  
18 distributors is called affiliate sales.

19 JUDGE SIPPEL: Okay. Thank you  
20 very much for that clarification. Normally,  
21 that is not pursuant to -- well, never mind.  
22 And you say he was a former employee of the

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1 company?

2 MS. WALLMAN: Yes.

3 JUDGE SIPPEL: Of WealthTV. Where  
4 is he now? I mean, he has left the company?

5 MS. WALLMAN: He has left the  
6 company.

7 JUDGE SIPPEL: And is that a  
8 reason why he is not being called?

9 MS. WALLMAN: There are a number  
10 of reasons -- the fact that he is a former  
11 employee, he resides in Texas, he had some  
12 chronic health problems around the time that  
13 we were finalizing pleadings and testimony, a  
14 variety of reasons.

15 MR. SOLOMON: Your Honor, this e-  
16 mail also includes the draft e-mail to Judy  
17 that you had already rejected. So what he is  
18 doing here is sending an e-mail to himself  
19 saying, "Here is my draft e-mail to Judy,"  
20 among other things. So, again, it is hearsay  
21 within hearsay. He is talking about Judy from  
22 Adelphia calling him. There is nobody to

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1 cross examine about it.

2 JUDGE SIPPEL: Thank you. Is  
3 there -- now, is there -- yes. What about  
4 that point that he is sending it to himself?  
5 There is no evidence, at least in the first  
6 part --

7 MR. ROSE: I believe that was just  
8 a way of printing it out so he could give it  
9 to Mr. Herring. Mr. Herring will testify  
10 about that.

11 JUDGE SIPPEL: Well, it certainly  
12 is not -- it is not going to be received  
13 without Mr. Herring, but I don't understand  
14 for what purpose it would be -- again, it  
15 looks like a memory thing?

16 MR. SOLOMON: I mean, Your Honor,  
17 if Mr. Herring wants to talk about what he  
18 heard at the meeting -- at a meeting, that is  
19 fine. He can be cross examined. But for Mr.  
20 Herring to say, "I am relying on an e-mail  
21 somebody else in the company sent to  
22 themselves two years later to support my

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1 recollection," that is just total hearsay and  
2 shouldn't be admitted into evidence without  
3 him appearing to be cross examined.

4 MR. ROSE: I think it falls under  
5 the category of the earlier things where it is  
6 likely to refresh his recollection and to be  
7 reserved for that purpose.

8 JUDGE SIPPEL: Well, I mean, you  
9 can't -- well, I am going to rule -- I want to  
10 rule on that now. I don't see how you can --  
11 how he can rely on this to refresh his  
12 recollection if he didn't -- if he was not a  
13 party to it.

14 And, I mean, everything that Mr.  
15 Solomon said is -- seems to be true. It was  
16 created two years after the fact, two or three  
17 years after the fact, and for what purpose we  
18 don't know. And Mr. Herring is not a party to  
19 it being -- you know, to its summarization.  
20 I mean, Mr. Herring certainly can testify to  
21 the event, but not with this document, not on  
22 the basis of -- not on the foundation that you

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1 have laid so far.

2 So I am going to reject it. It is  
3 -- Exhibit 45 is identified as we have  
4 discussed it from John Ghiorzi to himself,  
5 dated April 16, 2008, or allegedly reporting  
6 on the contents of a meeting on July 12, 2005.  
7 And Mr. Herring is not identified in the  
8 document as being a recipient or as being an  
9 interested party of any kind.

10 So identified and rejected,  
11 because it is hearsay, and there is nothing at  
12 all to establish reliability, and Mr. Ghiorzi  
13 will not be called as a witness.

14 (Whereupon, the above-referred to  
15 document was marked as WTV Exhibit  
16 No. 45 for identification, but was  
17 rejected as an exhibit.)

18 Next document, please.

19 MR. ROSE: This is another e-mail.

20 Well, it is --

21 JUDGE SIPPEL: This has got to be  
22 46, is that correct?

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1 MR. ROSE: Are we on 49? 46. Oh,  
2 I am ahead of myself. Okay. I understand it  
3 is not objected to, so that should be easy.

4 JUDGE SIPPEL: Sir?

5 MR. ROSE: My understanding is  
6 there is no objection to this one.

7 JUDGE SIPPEL: Is that correct?

8 MR. COHEN: Yes, Your Honor. No  
9 objection.

10 JUDGE SIPPEL: Then, Exhibit 46  
11 appears to be from -- an e-mail from Mr.  
12 Herring to Mickey Carter. Who is Mickey  
13 Carter?

14 MR. COHEN: He is at Time Warner  
15 Cable, former employee who will testify during  
16 the course of the proceeding.

17 JUDGE SIPPEL: It is dated July  
18 19, 2006. The subject is WealthTV. It is  
19 unique and differentiating -- all right. No  
20 objection. It is received in evidence. It is  
21 identified and received in evidence as WTV  
22 Exhibit 46.

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1 (Whereupon, the above-referred to  
2 document was marked as WTV Exhibit  
3 No. 46 for identification, and was  
4 received in evidence.)

5 Next exhibit, please.

6 MR. ROSE: The next exhibit is an  
7 e-mail from a WealthTV employee, I believe a  
8 sales person, to a person at Bright House that  
9 was forwarded to Mr. Herring, and that he in  
10 turn forwarded to Robert Herring.

11 JUDGE SIPPEL: This is Exhibit 47.

12 MR. ROSE: It was copied to  
13 Charles Herring and forwarded to Robert  
14 Herring.

15 JUDGE SIPPEL: Well, let me first  
16 ask if there is going to be an objection.

17 MR. COHEN: Yes, Your Honor, on  
18 hearsay with respect to the e-mail from Mr.  
19 Scaro to Ms. Stithe at Bright House. Again,  
20 you know, Mr. Scaro is not here to be cross  
21 examined. I mean, it was forwarded to Mr.  
22 Herring, but that doesn't -- you know, it

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1 doesn't help us with -- he didn't have the  
2 conversation for which this is being offered.

3 MR. ROSE: These are the records  
4 he has that these contacts occurred. That is  
5 about the only basis for getting it in, I am  
6 afraid.

7 JUDGE SIPPEL: I am afraid it is  
8 just not good enough. It comes down to a  
9 hearsay reliability question, and there is no  
10 witness to tie it in. So received -- I'm  
11 sorry, it is identified and -- yes, go ahead.

12 MR. ROSE: I'm sorry. Go ahead.

13 JUDGE SIPPEL: I am going to say  
14 it is identified anyway as a memo -- it is a  
15 memo from Charles Herring to Robert Herring,  
16 but it -- Charles Herring apparently is --  
17 Robert Herring I guess is the father of  
18 Charles?

19 MR. ROSE: Yes. Charles is  
20 forwarding the e-mail to his father with a  
21 little cover statement, and the e-mail came --  
22 was copied to Charles by Mr. Scaro when he

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